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EDMONSON et al. v. THOMASSON et al.

June 8, 1911.

[71 S. E. 536.]

1. Set-Off and Counterclaim (§ 44*)—Partnership and Individual Demands.—Partnership demands and demands due to individual partners cannot be set off against each other.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 82-99; Dec. Dig. § 44.* 10 Va.-W. Va. Enc. Dig. 896; 12 Va.-W. Va. Enc. Dig. 258.]

2 Set-Off and Counterclaim (§ 44*)—Partnership and Individual Demands.—A partner, indorsing a firm note discounted by a bank, placing the proceeds to the credit of the firm, is, on the insolvency of the bank and firm, entitled to set off his deposit in the bank as against his liability as indorser on the receiver, resorting to him because of the inability of the firm to pay; but where the partner, as indorser, can indemnify himself by resort to the assets of the firm, if solvent, or to the extent of any dividends to which he is entitled on a distribution of the firm's assets, he is not entitled to such set-off.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 82-99; Dec. Dig. § 44.* 10 Va.-W. Va. Enc. Dig. 896; 12 Va.-W. Va. Enc. Dig. 258.]

Appeal from Circuit Court, Mecklenburg County.

Petition by R. L. Thomasson and others against J. W. Edmonson and another, receivers of the Bank of Mecklenburg, to establish a right to set-off. From a decree granting the relief prayed for, the receivers appeal. Reversed and remanded.

E. P. Buford, C. T. Baskerville, Abner C. Goode, W. E. Homes, and Chas. J. Faulkner, Jr., for appellants.

R. Turnbull & Son, for appellees.

HARRISON et al. v. CLEMENS, Road Com'r, et al.

June 8, 1911.

[71 S. E. 538.]

1. Mandamus (§ 173*)—Voluntary Nonsuit—Condition of Cause.—The right to take a nonsuit, recognized by Code 1904, § 3387, providing that the right to a nonsuit must be exercised before the jury retires from the bar, exists until the case is submitted for decision to the jury, or to the court when sitting without a jury; so that a relator in mandamus, who before the conclusion of the argument before the court trying the case asks leave to take a nonsuit, is entitled

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

thereto as a matter of right, in the absence of rights of defendant which would be prejudiced by a dismissal of the action.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 380; Dec. Dig. § 173.* 4 Va.-W. Va. Enc. Dig. 716.]

2. Appeal and Error (§ 1175*)—Disposition of Case on Appeal—Rendition of Proper Judgment.—Where the trial court erroneously denied a nonsuit and dismissed the action, the Supreme Court of Appeals on writ of error will reverse the judgment of dismissal, and enter judgment permitting a nonsuit, with costs on the writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4573-4581; Dec. Dig. § 1175.* 1 Va.-W. Va. Enc. Dig. 628.]

Error to Circuit Court, Loudoun County.

Mandamus by Henry Harrison and others against William H. Clemens, Commissioner of Roads in Leesburg District, in Loudoun County, and another. There was a judgment dismissing the petition, and adjudging that relators pay costs, and they bring error. Reversed.

J. W. Foster, for plaintiffs in error.

E. E. Garrett, for defendants in error.

SCHWAB v. WASHINGTON LUNA PARK CO., Inc.

June 8, 1911.

[71 S. E. 542.]

1. Master and Servant (§§ 101, 102*)—Duty of Master—Machinery and Appliances.—It is the master's duty to use ordinary care to provide reasonably safe machinery for use of his servants, failing to do which he is liable for a resulting injury to a servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 180-184; Dec. Dig. §§ 101, 102.* 9 Va.-W. Va. Enc. Dig. 674.]

2. Master and Servant (§ 234*)—Injury to Servant—Defective Appliances—Promise to Remedy.—Where a servant notifies the master of a defect in an appliance, and the master promises to remedy it, and the servant, relying on the promise, continues to use the appliance, and is shortly thereafter injured, the master is liable, unless the danger is so manifest that no reasonably prudent person would incur the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 684-686; Dec. Dig. § 234.* 9 Va.-W. Va. Enc. Dig. 680.]

3. Master and Servant (§ 289*)—Injury to Servant—Defective Appliances — Contributory Negligence.—While a so-called "Ariel

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